GAITHER D. PAUL

IBLA 2000-345 Decided September 22, 2003

Appeal from a decision of the Alaska State Office, Bureau of Land Management, rejecting Native allotment application. F-033425, Parcel B.

Affirmed.

1. Alaska: Alaska Native Claims Settlement Act--Alaska: Native Allotments--Alaska Native Claims Settlement Act: Administrative Procedure: Applications--Applications and Entries: Filing

When a Native allotment applicant alleges that he timely submitted allotment applications for two separate parcels of land with officials of the Bureau of Indian Affairs but the Bureau of Land Management has no record of timely receiving the application for one of the parcels, the applicant will normally be afforded a fact-finding hearing in which he may attempt to show that he did, in fact, make timely application for the parcel in question. However, when the applicant himself presents contradictory evidence as to the filing of the application for the second parcel that undermines his claim that the application was timely filed, BLM properly rejects the application without a hearing.

APPEARANCES: Harold J. Curran, Esq., Anchorage, Alaska, for appellant; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Gaither D. Paul has appealed the July 13, 2000, decision of the Alaska State Office, Bureau of Land Management (BLM), rejecting parcel B of his Native allotment application F-033425.

Paul completed and signed Native allotment application F-033425 on September 18, 1964, seeking 70 acres of unsurveyed land located within sec. 2, T. 19 N., R. 10 E., Copper River Meridian (CRM), Alaska, pursuant to the provisions of the Alaska Native Allotment Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 to 270-3 (1970) (Native Allotment Act) (repealed effective December 18, 1971, by section 18(a) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1617(a) (2000), with a savings provision for applications pending on December 18, 1971). The Bureau of Indian Affairs (BIA) certified Paul's application on September 21, 1964, and filed it with BLM on September 23, 1964.

By notice dated October 30, 1964, BLM advised Paul that he was required to submit proof of substantially continuous use and occupancy of the claimed land for a 5-year period no later than September 23, 1970, or his application would terminate without prejudice to his filing a new application.

On October 28, 1965, after learning that the new Native allotment regulations (43 CFR 2212.9 (1965)) allowed applicants who used more than one tract to include those separate tracts in a Native allotment application, Paul informed BLM that he wanted to amend his application to include an additional 80 acre tract and would submit an amended application when he had properly staked and described the land. BLM records do not reflect receipt of any such amended application.

Paul submitted his evidence of use and occupancy of the land described in F-033425, which he signed on July 18, 1969, to BLM on August 7, 1969, asserting that, beginning in 1940, he had used the land annually from June 30 through October 30 as a fish camp. Paul's Native allotment was surveyed in August 1969 based on the metes and bounds description in the 1964 application and was designated as Lot 1, U.S. Survey No. 5619, Alaska, containing 90.09 acres more or less. A BLM realty specialist examined Paul's allotment on November 7, 1972, to determine whether his use and occupancy of the land complied with the requirements of the Native Allotment Act. In the field report prepared on February 6, 1973, and approved February 12, 1973, the BLM realty specialist, after noting that Paul had no other known claim or use of other land in that area, recommended that Paul be granted the allotment.

By letter dated June 26, 1973, BLM sent Paul a copy of the official plat of survey depicting his allotment as Lot 1 of U.S. Survey No. 5616, Alaska, situated at Mansfield Village on the east bank of Fish Creek. BLM granted Paul 90 days to advise it whether the surveyed lot contained his improvements, adding that if he did not timely respond, BLM would consider the survey accurate and adjust his claim

accordingly. Paul did not respond to BLM's letter, and on March 14, 1975, BLM issued Certificate of Allotment No. 50-75-0136 to Paul for 90.09 acres.

By letter dated March 20, 1990, the Tanana Chiefs Conference, Inc. (Tanana Chiefs), provided BLM a list of reconstructed Native allotment applications allegedly received by BIA but lost during the rush prior to ANCSA's repeal of the Native Allotment Act. The list included Paul's application for F-033425, parcel B, described as 70 acres in sec. 4, T. 23 N., R. 8 E., CRM.

On January 21, 1994, BLM received a memorandum from Tanana Chiefs, dated November 30, 1993, forwarding a reconstructed application for parcel B; an affidavit from Paul; an affidavit from Edward Isaac, a former BIA employee; a master title plat (MTP) for T. 23 N., R. 8 E., CRM; and a Tanacross (D-6) quadrangle map containing Paul's hand-drawn location of the parcel along with a note that the original map for Paul's parcel B could not be found. The memorandum also included a statement from the Superintendent, Fairbanks Agency, BIA, concurring that the application had been filed prior to December 18, 1971.

In the reconstructed application for parcel B signed by Paul on August 1, 1991, and certified by BIA on January 14, 1994, Paul alleged use and occupancy of land located on T-Lake every year from 1930 through 1954 for seasonal hunting and trapping and for keeping dogs. Paul's August 1, 1994, affidavit, in addition to expanding on the use and occupancy summarized in his reconstructed application, averred that:

> 1. I filed my Native allotment on or about July 16, 1969. I filed with Edward Isaac. I filed same time as Fish Creek. It's supposed to be 80 acres each, but 90 went to my place on Fish Creek. So it's alright to have the remaining acres at T-Lake to total 160 acres.
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> 2. Edward Isaac and a white man came to my house in Tanacross, across the river. It was my daddy's house. Eddie was working for BIA. My dad, David Paul, and probably my brother Winfred Paul were there. They are both gone.
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> 3. When I applied they had quite a few maps with them. They had maps of everything on the trail. I think I wrote my name on the map. It was same time as Fish Creek land. It's supposed to be 80 acres.
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> 4. They said they were going to file it. I don't know why it should get lost, it's done same time as the other one.

(Paul Affidavit at 1-2.)

In his November 22, 1993, affidavit, Isaac stated that he was hired by BIA in late September 1970 and worked in its Realty Department through December 15 or 20, 1970, when he started working at Eielson Air Force Base. He explained that his duties were to draft maps and to travel to various Native villages to take applications for Native allotments. He made two village trips, stopping in Tanacross each time. He described the process used to complete the applications as follows:

> I fill out the applications for the people of Tanacross and the other villages. They sign their own name. We had a big meeting at the school (1st trip) and the Community Hall (2nd trip). This was at the old village. The applicants told me where their land was and how many acres there. Most of them selected four 40 acres lots. Few of them got mixed acres like 1 acres and other sizes. They pointed on the map and I wrote their name. I was, and still am, very familiar with the land all around Tanacross.
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> Attached is a list of applications I remember taking. The applications I took I brought them to the BIA office and we were supposed to give description and draft maps. At that time I was called back to work at Eielson. I told Ralph Solomon, Kathy Adams and Bill Mattice [other BIA employees] that I didn't finish with the descriptions. I told them they need to finish it. After that Ralph Solomon and Kathy Adams were to complete the applications. * * *.
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> Attached are copies of U.S.G.S. Quad maps which have allotments drawn on them. I have reviewed each of the maps and have indicated which allotments were drawn by me. We had these maps when we visited the applicants.

(Isaac Affidavit at 1-2.) Paul's application for parcel B was included in the attached list but the entry noted that the attached map was not the original and neither Isaac nor Bill Mattice identified the handwriting on the map as his. [1/]

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[1/] The case file contains a copy of a letter from Mattice to the Tanana Chiefs, dated Feb. 24, 1989, in which Mattice states that he is "returning your Native allotment maps to you, annotated as to what markings are my writing or may be my writing." He explains that some of the maps were difficult to read, but "I'm sure that none of the markings are mine that I did not identify."

By letter dated May 18, 1995, BLM advised Tanana Chiefs that it intended to deny reinstatement of Paul's application for parcel B, among others, for lack of supporting evidence that the application had been timely filed and that a decision on that issue would be forthcoming.

In its July 13, 2000, decision, BLM rejected Paul's application for parcel B. After recapping the history of Paul's Native allotment application, BLM determined that the evidence did not support Paul's assertion that the application for parcel B had been timely filed:

> Gaither Paul stated in his affidavit that he filed a timely application for his second Parcel with Edward Isaac at the same time he filed his original application on or about July 16, 1969. Gaither Paul's original application was received by BIA on September 23, 1964. The only document Gaither Paul filed with BLM in 1969 was an evidence of use and occupancy form. Edward Isaac stated in his 1993 affidavit that he was not employed by BIA until September 1970, therefore, Edward Isaac could not have accepted Gaither Paul's Native allotment application for Parcel B in 1969.
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> Attached to Edward Isaac's 1993 affidavit was a list of Native allotments; next to each allotment either Bill Mattice or Edward Isaac marked the column identifying their handwriting on the master quad maps. The list corresponded to the handwritten names of the applicants on the master quad maps taken during the two trips to Tanacross in 1970. Neither Bill Mattice [n]or Edward Isaac identified their handwriting on the master quad maps in association with Parcel B of Gaither Paul's Native allotment.
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> Stapled to the quad map submitted with Parcel B of Gaither Paul's reconstructed Native application was a note from [Tanana Chiefs], stating that they did not have the original master quad map depicting Parcel B of Gaither Paul's Native allotment application. However, [Tanana Chiefs] did have a copy of the master quad map depicting Parcel D of Reka Paul's and Parcel B of Julius Paul's Native allotment applications F-1655 and F-4944, respectively, (located in the same township and range).
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> The BLM has also accepted as proof that an application was timely filed if that Native allotment is shown on a quad map of another timely filed application. Therefore, BLM reviewed case files F-1655 and

> F-4944, (Native allotment application F-1655, Parcel D, was signed December 2, 1970, the date [Tanana Chiefs] said Edward Isaac was in Tanacross). The copy of the master quad maps attached to those applications did not depict Parcel B of Gaither Paul's Native allotment.
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> To determine if an application is timely filed with the Department, there must be independent corroborating evidence that the Native allotment application was actually received by a Departmental office on or before December 18, 1971. Affidavits attesting to a timely filing alone are not sufficient to show timely filing.
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> The BLM finds that the evidence compiled by [Tanana Chiefs] does not establish that Parcel B of Native allotment application F-033425 was timely filed with the BIA/Department on or before December 18, 1971.
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> The Department has no authority to consider any application not filed with a bureau, division, or agency of the Department on or before December 18, 1971. Therefore, Parcel B of Native allotment application F-033425 is rejected. * * * [Citations omitted.]

(Decision at 3-4.)

On appeal, counsel for Paul argues that Isaac's affirmation that, as a BIA officer, he remembers accepting a Native allotment application for parcel B from Paul in 1970 establishes that Paul's application for parcel B was timely filed. Citing the Horton Memorandum, [2/] counsel maintains that Isaac's affidavit and BIA's Fairbank's

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[2/] In a memorandum to the Director, BLM, dated Oct. 18, 1973, Assistant Secretary Jack O. Horton discussed section 18 of ANCSA:

"This phrase [pending before the Department on December 18, 1971] is interpreted as meaning that an application for a Native allotment must have been on file in any bureau, division, or agency of the Department of the Interior on or before December 18, 1971. The Department has no authority to consider any application not filed with any bureau, division, or agency of the Department of the Interior on or before said date. Evidence of pendency before the Department of the Interior on or before December 18, 1971, shall be satisfied by any bureau, agency or division time stamp, the affidavit of any bureau, division or agency officer that he received said application on or before December 18, 1971, and may also include an affidavit executed by the area director of BIA stating that all applications transferred to BLM

(continued...)

Agency Superintendent's January 14, 1994, statement that the application for parcel B was timely filed with BIA render it more likely than not that Paul's application was pending before the Department on December 18, 1971.

[1] The Native Allotment Act, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), authorized the Secretary of the Interior to allot up to 160 acres of vacant, unappropriated, and unreserved nonmineral land in Alaska to any Native Alaskan Indian, Aleut, or Eskimo, 21 years old or the head of a family, upon satisfactory proof of substantially continuous use and occupancy of the land for a 5-year period. That Act was repealed by section 18(a) of ANCSA, 43 U.S.C. § 1617(a) (2000), with a savings provision for applications pending before the Department on December 18, 1971. If an application was not pending before the Department on that date, BLM has no authority to grant the applicant's requested Native allotment. See Mitchell Allen, 117 IBLA 330, 336 (1991).

BLM determined that no application for parcel B was pending before the Department on December 18, 1971; Paul maintains, however, that he submitted an application for parcel B in July 1969, at the same time that he applied for his allotment on Fish Creek. When disputed issues of material fact exist regarding whether a Native allotment application was timely filed, BLM must normally afford the applicant the opportunity for a hearing before rejecting the application, regardless of whether the applicant has submitted corroborative statements by BIA employees to establish that a parcel had been inadvertently omitted from an application BIA had transmitted to BLM. See, e.g., Timothy Afcan, 157 IBLA 210, 220-222 (2002), and cases cited; Mitchell Allen, supra; Donald Peter, 107 IBLA 272, 276 (1989); William Carlo, Jr., 104 IBLA 277, 282 (1988); Heirs of Linda Anelon, 101 IBLA 333, 336-37 (1988); Nora L. Sanford (On Reconsideration), 63 IBLA 335, 337, (1982); Eleanor H. Wood, 46 IBLA 373, 380 (1980); see generally, Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976). The right to a hearing is not absolute, however, and a Native allotment application may be rejected without a hearing when, assuming the truth of the relevant facts supporting the application, the application is deficient as a matter of law. Boy Dexter Ogle, 140 IBLA 362, 372 (1997), and cases cited.

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2/ (...continued)
from BIA were filed with BIA on or before December 18, 1971. [Emphasis in original.]"
See Katmailand, Inc., 77 IBLA 347, 353-54 (1983).

We conclude that no hearing is warranted in this case because Paul himself has submitted contradictory evidence fatally undermining his assertion that an application for parcel B was pending before the Department on December 18, 1971. Specifically, although Paul claims that he filed an application for parcel B with Isaac in July 1969 at the same time he applied for his Fish Creek parcel, [3/] in his affidavit submitted in support of Paul's reconstructed application for parcel B, Isaac explicitly states that he was not hired by BIA until September 1970 and worked with that bureau only until December 15 or 20, 1970. Therefore, he could not have taken an application from Paul as a BIA official in July 1969.

This case is distinguishable on its facts from Robert F. Paul, Sr., 159 IBLA 357 (2003). In that case, the Board, inter alia, set aside and remanded that part of a BLM decision rejecting Native allotment application F-092393 for 40 acres in secs. 20, 21, 28, and 29, T. 32 N., R. 10 E., Copper River Meridian (Billy Creek area), as untimely. The basis for BLM's rejection of the Billy Creek application was "the lack of independent corroborating evidence establishing that the 40-acre application was actually received by a Department office on or before December 18, 1971." Id. at 360. While noting that no time stamp of any bureau, agency, or division of the Department had been placed on the Billy Creek application, the Board found fault with BLM's failure to analyze in its decision a cover memorandum from Tanana Chiefs, similar to that provided in this case, and the accompanying forms and affidavits submitted for the Billy Creek application. The Board noted that the cover memorandum contained on its face a signed declaration of the Superintendent, BIA Fairbanks Agency, stating his concurrence with the fact that the application was filed timely prior to December 18, 1971. Again, a similar statement appeared in the present case. The Board then stated that "[t]he BLM decision did not consider whether this affirmation qualifies as an 'affidavit of any bureau, division or agency officer that he received an application on or before December 18, 1971'." Id. at 368-69.

In the present case, BLM carefully analyzed all the evidence accompanying the November 30, 1994, Tanana Chiefs' memorandum and specifically found that that evidence did "not establish that Parcel B of Native allotment application F–33425 was timely filed with the BIA/Department on or before December 18, 1971." (Decision at 4.) Neither the Isaac affidavit nor the statement of the Superintendent, Fairbanks BIA, can be considered evidence of the receipt of the application by the Department

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[3/] The record shows that Paul filed his Native allotment application for the Fish Creek parcel in Sept. 1964. He signed his use and occupancy statement for the Fish Creek parcel in July 1969

on or before December 18, 1971, in the face of the other evidence in the present case cited above.

The facts herein are in contrast to those in Alice D. Brean, 159 IBLA 310 (2003), another case involving BLM's rejection of a Tanacross Native allotment application (F-031218, Parcel D). Therein, BLM concluded that the record failed to show independent corroborating evidence that Brean's application was actually received by a Departmental office on or before December 18, 1971. We we set aside the BLM decision and referred the case for a hearing based on our conclusion that there was sufficient evidence in the record to raise a factual question whether Brean's application was timely filed. We stated:

> The affidavits of Brean and Isaac in large part corroborate each other. They tell a story that Isaac worked for BIA, went to Tanacross with other BIA employees, participated in meetings in which BIA employees told residents to supplement Native allotment applications with requests for up to 160 acres, and accepted requests from individuals. They consistently state that Brean submitted to Isaac, in some manner, a desire that an application for Parcel D be prepared on her behalf, on December 2, 1970.

159 IBLA at 317.

We found in Brean that the lack of map evidence in support of Brean's application did not undermine the strength of Brean's and Isaac's corroborating statements. See id. at 322-23. [4/]

Accordingly, we conclude that, under the facts of this case, BLM properly rejected Paul's reconstructed application for parcel B without first affording him a hearing.

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[4/] In contrast, in the present case the lack of an original quadrangle map depicting parcel B and containing a handwritten notation by Isaac or Paul that the parcel was claimed by Paul is corroborative of the lack of timely filing in the face of the contradictory record evidence.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

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C. Randall Grant, Jr.
Administrative Judge